Case No. S143087
1st Civ. No. A110069

IN THE SUPREME COURT OF CALIFORNIA

CLUB MEMBERS FOR AN HONEST ELECTION,

Plaintiffs/Appellants, and Cross-Respondents,

vs.

SIERRA CLUB, A CALIFORNIA NON-PROFIT PUBLIC BENEFIT CORPORATION, ET AL.

Defendants, and Appellants.

Appeal From an Order of the San Francisco County Superior Court
Honorable James L. Warren, Judge
Case No. 04-429277

PETITIONERS' OPENING BRIEF

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TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE OF THE STATE OF CALIFORNIA, AND TO THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Petitioners Sierra Club, a California Non-profit Public Benefit Corporation, Nick Aumen, Jan O'Connell, David Karpf, Sanjay Ranchod, Lisa Renstrom, and Greg Casini (collectively "Sierra Club") respectfully submit their Opening Brief.

1.
ISSUES PRESENTED FOR REVIEW

A. Issues Presented by Sierra Club.

1. Was Sierra Club entitled to the protection of the anti-SLAPP statute against a complaint that sought to prevent and punish it for communicating about its controversial 2004 national Board of Directors election, and instead sought to force the Club to distribute material exclusively authored by Plaintiffs and other private remedies intended to further the candidacy and personal views of Plaintiffs?

2. Were a controversial article about Sierra Club's election and an "Urgent Election Notice" circulated as part of ballot materials to its 750,000 members protected as "political work[s]" under Section 425.17(d)(2)?

B. Additional Issues Presented by Plaintiff.

3. Where a cause of action for an alleged breach of fiduciary duty is directly connected to a cause of action for an alleged failure to provide legally required election procedures for a board of directors election, is the cause of action for breach of fiduciary duty entitled to the same exemption from an anti-SLAPP motion under Code of Civil Procedure Section 425.17(b) as the cause of action for the alleged failure to provide legally required election procedures?

4. Is a determination of whether a plaintiff is likely to prevail on a cause of action pursuant to section 425.16(b)(3) to be made independently of a ruling on whether that plaintiff actually prevails?

5. Does the exemption for "actions" in Code of Civil Procedure Section 425.17(b) include the entire action, or may a court separate causes of action that do not qualify for Section 425.17(b)'s protections?

2.
INTRODUCTION

This appeal concerns a decision of the First District Court of Appeal that, unless reversed by this Court, threatens to nullify the First Amendment protections provided by California's anti-SLAPP

statute, Code of Civil Procedure Section 425.16, in lawsuits purportedly filed in the "public interest" but which actually seek personal relief. The Legislature enacted Code of Civil Procedure Section 425.17(b) in 2003 to limit the scope of the anti-SLAPP statute by protecting a narrow category of actions "brought solely in the public interest" from swift dismissal under the anti-SLAPP statute. Sierra Club, the nation's largest grassroots environmental organization – and the "nation's leading "SLAPP target"[1] – supported passage of the new statute because it exempted from the anti-SLAPP statute, purely public interest lawsuits, such as environmental actions, that vindicate the public interest without seeking any personal relief for the plaintiff.

Section 425.17(b) creates a bright-line test at the outset of litigation requiring a trial court to determine whether a lawsuit is "brought solely in the public interest" based on the relief sought in the complaint. Section 425.17(b) requires plaintiffs to face a special motion to strike under Section 425.16 if any part of their lawsuit seeks "any relief greater than or different from the relief sought for the

[1] George W. Pring & Penelope Canan, SLAPPs: Getting Sued for Speaking Out, 85 (Temple University Press, 1996).

general public or a class of which the plaintiff is a member." Cal. Civ. Proc. Code § 425.17(b)(1).

Despite the express language of Section 425.17(b), the Court of Appeal held that three of the four causes of action in Plaintiffs' lawsuit were in the "public interest" and therefore immune from Sierra Club's anti-SLAPP motion. The Court of Appeal did so while acknowledging what Plaintiffs concede – and the trial court twice determined – that certain of the relief in the Complaint was personal to Plaintiffs.

Misinterpreting Section 425.17(b), the Court of Appeal substituted its own legal test, eviscerating the statute's bright-line rule. Under the Court of Appeal's test, a trial court can find that a cause of action is "brought solely in the public interest" merely by finding that the "gravamen" or "principal thrust" of the claim is in the public interest – and ignore the fact that a plaintiff is indisputably seeking personal relief in the complaint, as the Plaintiffs concede they sought here. Not only did the Court of Appeal err by ignoring the personal relief sought in Plaintiffs' Complaint, it compounded this mistake by improperly interpreting Section 425.17(b) to read out certain language used therein, by focusing on the causes of action pled by Plaintiffs

rather than the relief they sought, and it relied too heavily on the private attorney general statute, Code of Civil Procedure Section 1021.5. The Court of Appeal's errors are clear and should be reversed.

The Court of Appeal's reliance on the private attorney general statute to interpret Section 425.17(b) is particularly erroneous because the statutes fundamentally differ in their language and in how and when they are used. Unlike Section 425.17(b), the private attorney general statute does not offer a bright-line test for defining when a lawsuit is "brought solely in the public interest." Under Section 1021.5, courts are granted broad discretion to consider several factors in deciding whether the prevailing parties qualify for an award of private attorney fees. Significantly, under Section 1021.5, prevailing plaintiffs may qualify for fee recovery even if they have recovered monetary or other personal relief, so long as the court determines that the action has "resulted in the enforcement of an important right affecting the public interest" and the public benefit "transcended" the private benefit to the plaintiff. Cal. Civ. Proc. Code § 1021.5. In contrast, under Section 425.17(b), such hybrid private-benefit-public-interest lawsuits are expressly subject to the rigors of the anti-SLAPP

statute, ensuring that lawsuits purportedly filed in the public's interest, but which actually seek personal relief, do not infringe First Amendment-protected speech activities. Moreover, Section 1021.5 is applied at the conclusion of a lawsuit and only after the plaintiff has prevailed in the action. Plaintiffs in this action could never have satisfied Section 1021.5 because the trial court dismissed their election challenge against Sierra Club on the merits and Plaintiffs chose not to appeal the summary judgment order.

Independently, the Court of Appeal also ignored, entirely, Section 425.17(d)(2), which requires lawsuits that target "political work[s]" – such as Sierra Club's election materials – to face special motions to strike. The Court of Appeal's misinterpretation of Section 425.17(b), and its failure to even address Sierra Club's reliance on Section 425.17(d)(2), if not corrected by this Court, threatens the continued availability of the anti-SLAPP statute for defendants like Sierra Club who rely on this procedural tool to quickly dismiss meritless actions that target First Amendment-protected speech and petitioning activities.

3.
PROCEDURAL HISTORY

A. The Struggle for Control of Sierra Club and Action Taken by Sierra Club's Board of Directors at its January 30, 2004 Meeting.

In 2003, Sierra Club leaders were alarmed by public statements made by Sierra Club Director Paul Watson at an animal rights conference about plans to take over Sierra Club and make fundamental changes in its policies and agenda. (Clerk's Transcript ("CT") 296-297.) Sierra Club's leadership also became aware of an article posted on anti-immigration web sites urging readers to join the fight to change Sierra Club's neutral position on immigration by becoming members for the specific purpose of influencing its Board election. On the web site of an organization called "White Politics, Inc." an article appeared below the heading: "Save The Sierra Club From Homo Jew Takeover," and on another it appeared next to an article comparing the cranial capacity of different human races. (CT 296-297.) Another group that had been established for the sole purpose of urging Sierra Club to change its immigration policy linked its web site to a web-zine containing numerous articles and postings suggesting the genetic inferiority of the intelligence of African Americans. (Id.)

Sierra Club's leadership reasonably perceived this threat posed by outside, non-environmental groups and their candidates as advocating agendas and missions contrary to that of Sierra Club, including decidedly anti-immigration and extreme animal rights agendas, through seeking to capture a majority vote of the Board of Directors to influence the direction of Sierra Club. (CT 296-298, 773, 779-780, 814.)

In response to this threat, several Sierra Club leaders expressed their concerns at Sierra Club's annual meeting in September of 2003. (CT 296, 303-313.) On January 15, 2004, thirteen past Sierra Club Presidents sent a letter expressing what they believed to be a "crisis facing the Club" that "can well be fatal, destroying the vision of John Muir, and the work and contributions of hundreds of thousands of volunteer activists who have built this organization." (CT 338-340.) Their letter also demanded that the Board of Directors endorse a specific slate of candidates in the Club's 2004 election selected by a committee of the Club (the "Nominating Committee" candidates). (CT 339.)

At its January 30, 2004 Board of Directors meeting, the Board rejected what it viewed as partisan efforts to notify its more than

750,000 members of these developments, including the request by the thirteen former Sierra Club Presidents to endorse the Nominating Committee candidates, and instead voted to fund and disseminate an Urgent Election Notice with the election ballot distributed to the Club's membership. (CT 896-897, 904-907, 941.) The Urgent Election Notice encouraged the Club's members to cast informed votes.

The ballot material also contained a one-page generalized discussion about the election, a list of the candidates, and 10 pages of candidates' statements about issues in Sierra Club's 2004 election. (CT 49-58.) These statements included warnings from candidates themselves that "outside groups are targeting the Sierra Club for takeover" to use the Club's multimillion dollar budget to promote a political agenda of "anti-immigrant," "veganism," and an "extreme version of animal rights," and urged Club members to "vote against the 'greening of hate.'" (CT 50, 57) (campaign statements of candidates Phillip Berry and Morris Dees). The candidate statements advocated various political agendas for Sierra Club, including strategies to "oust the Bush Administration and bring progressive environmental leadership to America" (CT 50) (campaign statement

of candidate Lisa Renstrom), and to "stabilize our population, for the sake of our grandchildren and Earth's ecosystem" (CT 51) (campaign statement of plaintiff and candidate van de Hoek). The campaign statements were infused with plans to influence government: "George Bush is our primary target, not McDonalds," said one candidate. (CT 50) (Berry statement). Petition candidate and former Colorado Governor Dick Lamm, touting his "political and policy expertise and media access" to "advance all [of the Club's] campaigns," pledged to "work to defeat the Bush administration's environmental assault." (CT 54.)

At the January 30, 2004 meeting, a majority of the Board of Directors also voted to allow the distribution and publication of an article about the Club's 2004 election authored by Club volunteer Drusha Mayhue (the "Mayhue Article") that was published in various Sierra Club chapter newsletters. (CT 904-907.) The Mayhue Article warned of "take-over efforts by people and parties with narrow, one issue agendas like animal rights and anti-immigration." (CT 80.) To provide members with information about this important Club election, Sierra Club members also independently engaged in certain speech activities aimed at informing the Club's members about involvement

by outside, non-environmental organizations in the election, advising them about where to find additional reliable information about candidates, and urging them to vote. (CT 813-818.) Sierra Club's highly contested 2004 election attracted considerable local and national media coverage and sparked a national debate about the future of the Club. (CT 817-818, 820-823, 948-1247) (157 Sierra Club 2004 election-related news items published during Spring of 2004).

B. Successful Anti-SLAPP Motions Permit Sierra Club to Conduct a Valid Election on Schedule, Thereby Assuring Stability and Continuity in Its Corporate Governance; The Trial Court Rejects Plaintiffs' Section 425.17 Defense.

Early on, candidates sought to influence Sierra Club's 2004 election by filing lawsuits. An election challenge was filed by candidate Lamm and two other candidates, but promptly abandoned after Sierra Club gave notice that it was moving to dismiss the action under the anti-SLAPP statute. Shortly thereafter, borrowing heavily from Lamm's Complaint, Plaintiff and candidate Robert "Roy" van de Hoek and Plaintiff Club Members for an Honest Election ("CMHE") initiated this lawsuit challenging pre-election activities by Sierra

Club.[2] (CT 20.) San Francisco Superior Court Judge James L. Warren denied Plaintiffs' application for a temporary restraining order – which sought to prevent distribution of the ballots for Sierra Club's 2004 election – and Plaintiffs filed a First Amended Complaint. (CT 98.)

The First Amended Complaint included an application for a preliminary injunction that would have, among other things, prohibited Sierra Club from engaging in election-related activities, including barring the Club from "using Sierra Club resources directly or indirectly to print, distribute, circulate, mail, email, fax, scan, or publish in any fashion the 'URGENT ELECTION NOTICE' or any variation," and from using Sierra Club funds to distribute similar campaign literature, both for the 2004 election and future elections. (CT 108-113.) As a remedy, among other things, the Complaint also sought to disqualify three qualified candidates from the ballot, enjoin the 2004 election ballots from being counted, and prohibit Sierra Club from seating the newly-elected candidates. (Id.)

Relying on California's anti-SLAPP statute, Sierra Club filed a special motion to strike the First Amended Complaint. (CT 273.)

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[2] Collectively, Plaintiffs van de Hoek and CMHE are referred to throughout as "Plaintiffs."

Sierra Club asserted that the anti-SLAPP statute applied because the claims arose from Sierra Club's constitutionally-protected free speech activities about a matter of public concern in a public forum. (CT 279-281.) The trial court denied Plaintiffs' motion for preliminary injunction in its entirety, and also granted Sierra Club's special motion to strike – but only as to the request for an injunction to bar or censor future speech. (CT 711-712.)

The trial court specifically determined that Plaintiffs' First Amended Complaint "is not brought in the 'public interest' and it is not brought on behalf of Sierra Club as the phrase 'public interest' is used in Section 425.17." (CT 711.) The trial court observed that Plaintiffs' First Amended Complaint "seeks a very specific form of relief for a specific group of people who are looking for relief for themselves and not on behalf of the public." (Id.) Plaintiffs did not appeal the trial court's order granting Sierra Club's special motion to strike in part, or its determination that Section 425.17(b) did not apply.

C. Sierra Club's 2004 Election Is Held and Plaintiff van de Hoek and CMHE's Candidates Are Soundly Rejected.

Over 170,706 Sierra Club members voted in the Club's 2004 election –22.67% of all members, the highest voter rate in any Club

election since 1976 and more than double that of any of the immediately preceding five Club elections in which voter response rates ranged between 8.7% (2003) and 10.1% (2000). (CT 784.) Plaintiff van de Hoek was not elected to the Board. (CT 884-886.) Defendants Aumen and O'Connell, two incumbent Board members, were re-elected to the Board, and three other members – Defendants Renstrom, Ranchod, and Karpf – were also elected to the Board. (CT 884-886.) All were elected by wide margins – literally tens of thousands of Club member votes. (CT 785-786, 884-886.) After Aumen left the Board voluntarily, Defendant Casini was unanimously appointed by the Board as a replacement. (CT 809.)

D. Plaintiffs File a Post-Election Complaint Against Sierra Club and Individual Directors; Sierra Club Files a Second Anti-SLAPP Motion.

Four months after Sierra Club's 2004 election, on September 2, 2004, Plaintiff and failed candidate van de Hoek and CMHE filed a Second Amended Complaint (hereinafter referred to as the "Complaint") against Sierra Club, and this time also named six individual directors as defendants. (CT 715.) Plaintiffs' Complaint alleged four causes of action: (1) violation of Corporations Code Section 5617; (2) declaratory relief; (3) breach of fiduciary duty; and

(4) violation of Business & Professions Code Section 17200. (CT 732-735.) The four causes of action were duplicative and essentially boiled down to one claim: that Sierra Club and the individually-named directors violated the Corporations Code and their fiduciary duty by voting to publish and distribute the disputed Urgent Election Notice, permitting the Mayhue Article to appear in Club newsletters, and authorizing other 2004 election-related expenditures, which had been approved by a majority of Sierra Club's Board of Directors at the January 30, 2004 meeting. (Id.)

Plaintiffs' Complaint also sought extensive injunctive relief that would personally benefit Plaintiffs van de Hoek and CMHE. As part of the relief requested in the prayer, the Complaint asked the court to install van de Hoek and four other unsuccessful Sierra Club candidates on the Board, and to order Sierra Club to publish, at its expense, "an article by Plaintiffs of equal length to that of the Mayhue editorial," to place an "Urgent Election Notice" with the ballots for the 2005 election, and also "to place an introduction written by Plaintiffs in the ballot for the 2005 Board election that is equal in length to the introduction in the 2004 ballot that extolled the virtues of the Nominating Committee Candidates." (CT 736-739.) The

Complaint also asked the court to "unseat" five elected or appointed Sierra Club Board members and bar them from running for election to the Club Board in 2005. (Id.) The Complaint also sought an injunction barring former Director Aumen and current Director O'Connell from "running for election in future Sierra Club Board of Directors elections for as long as the Court deems necessary and proper." (CT 739.) In response, Sierra Club filed a second special motion to strike which automatically stayed extensive written discovery that Plaintiffs propounded. Because the trial court did not immediately rule on the motion, the parties were required to file cross-motions for summary judgment.

E. Sierra Club Prevails on the Merits and Is Entitled to Recover Its Attorneys' Fees, in Part.

On February 23, 2005, the trial court issued two orders granting Sierra Club's motions in whole and in part. In one order, the trial court granted Sierra Club's motion for summary judgment and denied Plaintiffs' motion for summary judgment, dismissing the Complaint in its entirety. (CT 1650-1660.) In the other, the court granted Sierra Club's special motion to strike – but again, only in part. (CT 1663-1669.) The court held that Section 425.16 applied to a "portion" of the Complaint – the first cause of action under Corporations Code

Section 5617 and the entire third cause of action for breach of fiduciary duty – because those portions targeted Sierra Club's "voting conduct" in approving the use of Club funds to prepare and distribute certain election materials. (CT 1667, 1669.) The trial court did not expressly address Plaintiffs' assertion that the special motion to strike was barred by Section 425.17(b), as it previously had when it rejected this same defense by Plaintiffs in support of their First Amended Complaint (CT 711), but by granting Sierra Club's motion in part, it implicitly found that the "public interest" exemption did not exempt Plaintiffs' Complaint from the anti-SLAPP statute.

In granting summary judgment for Sierra Club, the trial court determined that Plaintiffs were asking the court to enforce "optional" provisions of the California Corporations Code and to ignore "mandatory provisions of the code that govern the elections of non-profit organizations like Sierra Club." (CT 1651 (emphasis in original).) Analyzing each of Plaintiffs' four causes of action, the court determined that the Club's 2004 election-related expenditures were expressly authorized by California Corporations Code Section 5526, approved by the Club's Board of Directors at its January 30, 2004 meeting, and also consistent with a resolution passed

by Sierra Club in 1997 concerning any takeover attempt by outside organizations.[3] (CT 1650-1659.) Independently, the court also ruled that the breach of fiduciary duty claims against former Sierra Club Director Aumen and current Director O'Connell were barred by Corporations Code Section 5526, Sierra Club's standing rules, and the business judgment rule. (Id.)

F. Plaintiff CMHE Appeals Only Anti-SLAPP Issues.

Plaintiff van de Hoek did not appeal. Plaintiff CMHE did not challenge the trial court's order granting Sierra Club's summary judgment motion and denying Plaintiffs' summary judgment motion. Instead, Plaintiff CMHE appealed only the trial court's order granting the special motion to strike part of Plaintiffs' Complaint which resulted in a mandatory award of Sierra Club's attorneys' fees and costs against it and van de Hoek. (Appellant's Opening Brief at 1, 2; CT 1679.) In turn, Sierra Club cross-appealed the trial court's partial denial of Sierra Club's second special motion to strike on the grounds

[3] In 1997, a non-Sierra Club entity funded a campaign mailing to tens of thousands of Club members regarding the Club's election. This mailing was viewed as a significantly larger campaign expenditure than had been traditional in Club elections up to that time. Following that election, the Board passed a resolution explicitly clarifying that nothing in its own election rules prohibited the Club from informing its members of any attempt by non-Club entities to influence the organization's elections. (CT 787, 790-798.)

that Plaintiffs' entire Complaint arose from Sierra Club's First Amendment-protected activities.

The Court of Appeal issued its opinion on March 24, 2006.[4] The Court of Appeal determined that there was "no doubt" that portions of the prayer in Plaintiffs' Complaint "seek a personal advantage for van de Hoek and CMHE." (Op. at 15.) The Court also noted that the Plaintiffs "have a certain personal stake" in their request for an order barring elected directors from running in the 2005 election and requiring distribution to the Club's membership – at Club expense – of materials written by Plaintiffs. (Op. at 16.) Nevertheless, the Court ruled that "the fact that portions of the prayer go beyond the scope of the relief consistent with a public interest action does not change the principal thrust or gravamen of these causes of action, which in other respects fall within the exemption of section 425.17(b)." (Op. at 16-17.) As for the third cause of action – for alleged breach of fiduciary duty by volunteer directors Aumen and O'Connell – the Court of Appeal found that the "gravamen of a cause of action seeking relief of such a personal kind does not satisfy the

[4] On April 25, 2006, the Opinion, certified for publication, became final. The official citation for the Opinion is Club Members for an Honest Election v. Sierra Club, 137 Cal.App.4th 1166 (2006).

public interest criterion of the exemption of section 425.17," and accordingly, it upheld the trial court's decision to strike this particular cause of action under the anti-SLAPP statute. (Op. at 17.) Thus, although on different grounds, the Court of Appeal affirmed the trial court's decision.

4.
THIS COURT SHOULD ENSURE THAT CALIFORNIA'S ANTI-SLAPP STATUTE CONTINUES TO SAFEGUARD FIRST AMENDMENT-PROTECTED ACTIVITIES, PARTICULARLY "POLITICAL WORK[S]," THREATENED BY PLAINTIFFS SEEKING PERSONAL RELIEF.

A. The Anti-SLAPP Statute Ensures the Early Dismissal of Lawsuits Targeting First Amendment-Protected Activities.

The California Legislature enacted Section 425.16 to provide a "fast and inexpensive unmasking and dismissal" of lawsuits that interfere with "the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Ludwig v. Superior Court, 37 Cal.App.4th 8, 16 (1995); Cal. Civ. Proc. Code § 425.16(a); see also Lam v. Ngo, 91 Cal.App.4th 832, 841 (2001) (Section 425.16 was intended "to provide a mechanism for the early termination of claims that are improperly aimed at the exercise of free speech or the right of petition").

Under the anti-SLAPP statute, any "cause of action against a person arising from any act of that person in furtherance of that person's right of ... free speech ... in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." Cal. Civ. Proc. Code § 425.16(b)(1).

In 1997, reacting to court rulings that interpreted the statute too narrowly and did not go far enough to quash lawsuits that targeted free speech rights, the Legislature amended Section 425.16(a) to ensure that it "shall be construed broadly." Id. § 425.16(a). Additionally, this Court has emphasized that "the broad construction expressly called for in [Section 425.16(a)] is desirable from the standpoint of judicial efficiency," and cautioned "that [a narrow construction] would serve Californians poorly." Briggs v. Eden Council for Hope & Opportunity, 19 Cal.4th 1106, 1121-1122 (1999); Navellier v. Sletten, 29 Cal.4th 82, 92 (2002).

"An appellate court, to the extent that it may do so, should give an interpretation [of the anti-SLAPP statute] favorable to the exercise of freedom of speech, not its curtailment." Bradbury v. Superior

Court, 49 Cal.App.4th 1108, 1114, n.3 (1996); accord Macias v. Hartwell, 55 Cal.App.4th 669, 673 (1997) ("the right to speak on political matters is the quintessential subject of our constitutional protections of the right of free speech" (citation, internal quotes omitted)). "To this end, when construing the anti-SLAPP statute" this Court has consistently instructed that it will follow, "[w]here possible ... the Legislature's intent, as exhibited by the plain meaning of the actual words of the law." Soukup v. Law Offices of Herbert Hafif, 39 Cal.4th 260, 279 (2006) (quoting California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist., 14 Cal.4th 627, 632 (1997)).

B. Section 425.17(b) and Subdivision (1) Exempt Only Actions "Brought Solely in the Public Interest" and Only Where the Plaintiff Does Not Seek Any Personal Relief.

In 2003, the Legislature enacted legislation to ensure that purely public interest lawsuits would be protected from early dismissal under Section 425.16. Section 425.17(b) provides:

> Section 425.16 does not apply to any action brought solely in the public interest or on behalf of the general public if all of the following conditions exist:
>
> (1) The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of

> which the plaintiff is a member. A claim for attorney's fees, costs, or penalties does not constitute greater or different relief for purposes of this subdivision.
>
> (2) The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons.
>
> (3) Private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter.

The plain language of Section 425.17(b), excluding private litigants who seek personal relief, provides an adequate guide for this Court; no review of the legislative history is necessary. (Section 4.D.1., infra.) This Court consistently has concentrated on the express language of the anti-SLAPP statute in reaching its conclusions. Most recently, in S.B. Beach Properties v. Berti, 39 Cal.4th 374, 379 (2006), the Court explained that "[i]n construing any statute, we first look to its language. ... 'Words used in a statute ... should be given the meaning they bear in ordinary use. ... If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature. ...'" (Citations omitted.) Interpreting the "unambiguous" language of the statute

there, the Court found that "the filing of a viable anti-SLAPP motion [is] a prerequisite to recovering any fees and costs" under the anti-SLAPP statute. Id.; accord Kibler v. Northern Inyo County Local Hospital Dist., 39 Cal.4th 192, 199 (2006) (in construing statute, court must begin with its words, giving them their plain meaning).

Nevertheless, the legislative history unambiguously supports the statute's plain language here. See Soukup, 39 Cal.4th at 279 ("we have more than once consulted that [legislative] history and found in it material that has buttressed our construction of the statutory language"); Briggs, 19 Cal.4th at 1120 (court may review legislative history to buttress its analysis of the anti-SLAPP statute); Equilon Enterprises, LLC v. Consumer Cause, Inc., 29 Cal.4th 53, 61 (2002) (same).

The Legislature's intent to make Section 425.17(b) unavailable to a plaintiff motivated by personal gain is explicit: "The public interest criteria [] make clear that suits motivated by personal gain are not exempted from the anti-SLAPP motion." Motion for Judicial Notice ("MJN") Exh. A (Assembly Committee on Judiciary Analysis, S.B. 515 (June 30, 2003)) at MJN0055. In enacting Section 425.17(b), the Legislature sought to exempt from the anti-SLAPP

statute, "public interest and class action lawsuits 'brought solely in the public interest or on behalf of the general public' when three specified conditions are met." Id. (Senate Judiciary Committee Analysis, S.B. 515 (May 7, 2003)) at MJN0094. The Legislature's goal was to create an exemption from the anti-SLAPP statute parallel to that already provided cases brought by a prosecutor: "Conceptually, these are virtually identical to when the D.A. or Attorney General enforces those same statutes. ... Since the statute already exempts actions filed by public prosecutors, it should provide a parallel protection when people are acting only in the public interest as private attorneys general, and are not seeking any special relief for themselves." Id. at MJN0094-MJN0095 (emphasis added). Thus, this Analysis explains that "[t]he three conditions have been carefully crafted so that not all public interest or class actions would be automatically exempt from the anti-SLAPP law. ... [C]ases that are motivated by personal gain ... would not be covered by the exemption." Id. at MJN0094 (emphasis added).

The Legislature did not intend to include in Section 425.17(b) – and therefore exempt from the anti-SLAPP statute – all cases that might confer some benefit on the public, which conceivably could

give rise to a fee award under Section 1021.5 (the effective result of the Court of Appeal's decision here). Rather, the Legislature intended to incorporate some of the requirements from Section 1021.5 into Section 425.17, but to also impose additional requirements on parties invoking Section 425.17. This is particularly clear in the Assembly Committee on Judiciary Analysis, which states that the bill:

> Prohibits an anti-SLAPP motion from being employed against any action brought solely in the public interest, or on behalf of the general public, if the plaintiff does not seek any relief greater than or different from the relief sought for the public or the class of which plaintiff is a member, and also satisfies the standards for a private attorney general action.

MJN Exh. A (Assembly Committee on Judiciary Analysis, S.B. 515 (June 30, 2003)) at MJN0046-MJN0047 (emphasis added); accord id. (Assembly Floor Analysis, S.B. 515 (July 9, 2003)) at MJN0041.

Ironically, Sierra Club was a supporter of the enactment of Section 425.17(b), but with the understanding that the exemption would only apply to "public interest" litigation: "By exempting cases brought on behalf of the public and in the public interest, SB 515 would assure that path breaking environmental laws such as the California Environmental Quality Act, Proposition 65, and others –

which are not and could never be SLAPP tools – would not be unfairly crippled by misuse of the SLAPP law." MJN Exh. B (Letter from Bill Magavern, Senior Legislative Representative, Sierra Club, to Ellen Corbett, California Assembly Committee on Judiciary Chair (June 17, 2003).)

Other than the First District Court of Appeal's decision in this case, every California appellate court that has analyzed Section 425.17(b) has applied the exemption consistent with its plain language. Other decisions from the First District Court of Appeal and the Second District have employed the same analysis and uniformly held that any request for personal relief removes a complaint from the immunity of Section 425.17(b). San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees' Retirement Assn.,125 Cal.App.4th 343, 358, n.9 (2004) (First District, Div. 2) ("petitions affecting the rights of specific persons or entities rather than the general public" would not be governed by Section 425.17(b)); Northern Cal. Carpenters Regional Council v. Warmington Hercules Associates, 124 Cal.App.4th 296, 299-301 (2004) (First District, Div. 1) (unfair business practices claim by carpenters against contractors and subcontractors, alleging failure to comply with prevailing wage

law, governed by Section 425.17(b) because claims are brought on behalf of third party workers, not plaintiffs); Blanchard v. DIRECTV, Inc., 123 Cal.App.4th 903, 912-917 (2004) (Second District) (unfair business practices claim not governed by Section 425.17(b) primarily because "Plaintiffs' UCL claim [seeking accounting, restitution] is entirely personal to them").[5]

The Second District in Ingels v. Westwood One Broadcasting Services, Inc., 129 Cal.App.4th 1050, 1065-1067 (2005), recognized the limitation created by the word "solely" as it appears in the introductory sentence to Section 425.17(b). In Ingels, the court determined that causes of action brought under the Unruh Act for age discrimination and for violation of Business & Professions Code Section 17200 did not satisfy Section 425.17(b)(1) because the plaintiff sought monetary damages. The court looked to the legislative history of Section 425.17(b) to support its interpretation of the narrow "public interest" exemption. The court determined that the legislative history of the section establishes that Section 425.17(b) applies to a limited category of lawsuits brought "solely in the public

[5] See also, Flores v. Emerich & Fike, 416 F.Supp.2d 885, 898 (E.D. Cal. 2006) (Section 425.17(b) did not apply to plaintiffs' claims because plaintiffs sought monetary damages for themselves and did not purport to bring their claims on behalf of the public.)

interest or on behalf of the general public." Id. at 1066 (quoting Cal. Civ. Proc. Code § 425.17(b)) (emphasis added.) These "public interest" lawsuits are filed "without an injured plaintiff" and by "people ... [who] are acting only in the public interest as private attorneys general, and are not seeking any special relief for themselves." Ingels, 129 Cal.App.4th at 1066 (emphasis in original).

The Court of Appeal's decision below is contrary to the plain language of Section 425.17(b), the legislative history of this statute, and all previous appellate court decisions, which have limited the availability of the "public interest" exemption to actions in which the plaintiff does not seek any personal relief. By expanding the narrow "public interest" exemption far beyond what was intended by the Legislature – e.g., allowing lawsuits to bypass scrutiny under the anti-SLAPP statute even when the plaintiff has a personal stake because the "gravamen" or "principal thrust" of a plaintiff's cause of action is purportedly in the public interest – the Court's decision renders the valuable protections of the anti-SLAPP statute unavailable to defendants who are engaged in First Amendment-protected activities.

C. Plaintiffs' Complaint Sought Relief That Was Personal to Them, Depriving Them of the Right to Rely on the Exemption of Section 425.17(b).

In this appeal, there is no dispute that Plaintiffs' Complaint sought relief that was personal to Plaintiff van de Hoek and to the members of Plaintiff CMHE. (CT 735-739.) Even Plaintiff CMHE concedes this point when it admits that "incidental relief would have been gained by plaintiff van de Hoek or CMHE had the Court ruled in favor of the Plaintiffs and had it granted two of many alternative types of relief sought." (Answer Brief to Petition for Review at 8-9) (emphasis omitted).

The Court of Appeal analyzed Plaintiffs' Complaint and specifically noted that portions of the relief sought, if granted, would have personally benefited Plaintiffs and no one else. The Court of Appeal observed that "portions of the prayer" were "calculated to give plaintiffs and their allies an advantage in intra-club politics." (Op. at 15.) It also observed that "[t]here can be no doubt that these portions of the prayer seek a personal advantage for [plaintiffs] van de Hoek and CMHE." (Id.) The Court of Appeal also noted: "we think that both CMHE and van de Hoek have a certain personal stake in the request for an order barring elected directors from running in the 2005

election and requiring distribution to the membership of materials written by the plaintiffs." (Op. at 16) (emphasis added). The Court concluded by acknowledging that Plaintiffs' "proposed orders pose the prospect of an injunction providing judicial assistance to the candidacy of van de Hoek and other persons sponsored by CMHE." (Id.)

Against this background of self-interest – personal relief not only conceded by Plaintiffs but recognized twice by the trial court and confirmed by the Court of Appeal below – there can also be no dispute that had this relief been successful, it presented profound implications for Sierra Club's ability to govern and communicate within this 750,000 member organization. The personal relief sought by Plaintiffs directly challenged long-established corporate statutory provisions that ensure that a non-profit organization may lawfully decide what candidates its governing board will endorse or otherwise support and whether or not corporate funds may be expended to support candidates. See Cal. Corp. Code § 5526. Plaintiffs' challenge was also contrary to the resolution, passed by the Club's Board of Directors in 1997, to resist takeover attempts. (CT 787, 790-798.)

Further, Plaintiffs' efforts to judicially compel Sierra Club to distribute election materials authored exclusively by Plaintiffs to Club members at Club expense, also threatened Sierra Club's First Amendment-protected political speech activities in the midst of its controversial 2004 national election. Governor Gray Davis Com. v. American Taxpayers Alliance, 102 Cal.App.4th 449, 459-60 (2002) ("Davis Committee") (lawsuit alleging violations of Political Reform Act affects "the fundamental right of political communication afforded under the federal and state Constitutions"); Miami Herald Pub'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (statute compelling newspapers to publish statements by political candidates violated newspapers' First Amendment rights).

D. The Court of Appeal Erred When it Ignored the Plain Language of Section 425.17(b) and Instead, Imposed Its Own Flawed and Subjective Test.

Notwithstanding the plain language of Section 425.17(b) and the findings by both the trial court and the Court of Appeal that Plaintiffs' Complaint sought personal relief – as Plaintiffs concede – the Court of Appeal concluded that the first, second and fourth causes of action in Plaintiffs' Complaint were exempt from the anti-SLAPP statute "to the extent that the Plaintiffs were seeking an adjudication

of the validity of the [Sierra Club's] election and the establishment of fair procedures in future [Sierra Club] elections." (Op. at 15.) The Court's analysis of whether Plaintiffs could rely on Section 425.17(b) should have concluded once it identified the variety of personal relief requested in Plaintiffs' Complaint. (CT 735-739.) Because of this personal relief, the Court of Appeal should have held that Plaintiffs' lawsuit was excluded from the narrow class of "public interest" lawsuits shielded by Section 425.17(b), and therefore subject to Sierra Club's anti-SLAPP motion.

Instead, drawing on selected language and court decisions interpreting Section 425.16 and Section 1021.5 (the private attorney general statute), the Court of Appeal fashioned its own legal test for when Section 425.17(b) is available. Nothing in the language of Sections 425.16 and 1021.5 or the decisions relied on by the Court of Appeal justifies its disregard of the plain language of Section 425.17(b) and subdivision (1). The Court of Appeal simply misread Section 425.17(b), and in a manner that has widespread implications for the continued availability of the anti-SLAPP statute to protect core First Amendment activities. As explained more fully below, the Court of Appeal's analysis is flawed in four fundamental respects.

1. The Court of Appeal Ignored Section 425.17(b)'s Express Requirement that Any Action Under Section 425.17(b) Be "Brought Solely In the Public Interest."

The Court of Appeal's first error occurred in its analysis of the phrase "public interest" as it is used in Section 425.17(b). The Court of Appeal mistakenly determined that this phrase should be given the same, expansive meaning as is used in the anti-SLAPP statute itself. (Op. at 8 & 11, discussing Cal. Civ. Proc. Code § 425.16(e)(3) & (4).) Yet, whether a defendant's act involves "a matter of public interest" – as required by Section 425.16 – is wholly distinct from whether a particular action is "brought solely in the public interest" by a plaintiff.[6] Cal. Civ. Proc. Code § 425.17(b) (emphasis added). The Court of Appeal failed to appreciate how the phrase "public interest" is modified by different words in each statute and crafted to examine the actions of different kinds of litigants. The Court of Appeal's

[6] Section 425.17(b), in the last part of its introductory sentence, also alternatively refers to any "action brought ... on behalf of the general public." Although this particular phrase is not at issue in this appeal it nevertheless is also immediately qualified by the phrase, "if all of the following conditions exist" as well as the express limitation found in subdivision (1) that "[t]he plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member." Cal. Civ. Proc. Code § 425.17(b)(1).

interpretation of this phrase also fails to appreciate that the word "interest" has a different meaning as it is used in the two statutes.

Under Section 425.16, a defendant may use the anti-SLAPP statute if their underlying speech activities are "in connection with an issue of public interest." Cal. Civ. Proc. Code § 425.16(e)(3), (4). Used in this context, "public interest" has been construed broadly because it is aimed at protecting speech about important public issues. Cal. Civ. Proc. Code § 425.16(a) ("[t]he Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process") (emphasis added). See also, e.g., Seelig v. Infinity Broadcasting Co., 97 Cal.App.4th 798, 807-08 (2003) (comments about contestant on reality television program "Who Wants to Marry a Multimillionaire?" were statements "in connection with an issue of public interest"). Indeed, the California Legislature specifically directed the courts to construe Section 425.16 broadly, as this Court has frequently acknowledged. Cal. Civ. Proc. Code § 425.16(a) (Section 425.16 "shall be construed broadly"); Briggs, 19 Cal.4th at 1120-21; Navellier, 29 Cal.4th at 92.

In Section 425.17(b) however, the focus of the phrase "public interest" is exclusively on the specific relief sought by the plaintiff. Here, the phrase "public interest" does not mean debates or topics in which the public is interested. In Section 425.17(b), the phrase "public interest" is preceded and modified by the phrase "brought solely in the public interest" – language that is scarcely mentioned in the Court of Appeal's analysis. The language "solely in the public interest" expressly limits Section 425.17(b)'s application to those lawsuits brought exclusively for the public good or for the benefit of the public. Seen in this light, the word "interest" takes on a completely different meaning as it appears in Section 425.17(b). This interpretation of "public interest" is consistent with the express limitations included in the statute. The limitation that appears at the beginning of Section 425.17(b), when combined with its mandatory three-part test, illustrates that the Legislature wanted the phrase "public interest" to be construed narrowly, not broadly, to allow only those actions "brought solely in the public interest" to proceed without being subject to the anti-SLAPP statute.

Ironically, the Court of Appeal's interpretation of Section 425.17(b) is the one interpretation that the Legislature specifically

sought to make impossible. The Legislature expressly included language modifying the phrase "public interest" – "brought solely in" – along with the three-part requirement found in subsections (1)-(3). When the Court of Appeal omitted the phrase "brought solely in the" public interest from its analysis, its decision impermissibly broadened what was intended to be a very narrow exemption that required the plaintiff to meet specific, defined standards. Indeed, read literally, the Court of Appeal interpreted the exemption to be as broad as Section 425.16 – creating an exemption that is as broad as the rule. This was a result that Section 425.17(b) was carefully written to avoid. E.g., MJN Exh. A (Senate Judiciary Committee Analysis, S.B. 515 (May 7, 2003)) at MJN0094. The Court of Appeal's expansive reading of Section 425.17(b) renders the anti-SLAPP statute unavailable to protect elections and core political speech, even when the plaintiff uses litigation as a campaign tactic for his own personal benefit.

2. The Court of Appeal Placed Undue Reliance on Section 1021.5.

The second error committed by the Court of Appeal is its undue reliance on Section 1021.5(b), the necessity-and-financial-burden criterion of the private attorney general statute, to interpret Section 425.17(b). (Op. at 11-13.) The Court of Appeal did so seemingly

without appreciating the substantial differences between the language of the two statutes, as well as the fundamental way in which each statute is used for entirely different purposes and at different times in litigation.

Section 1021.5, the private attorney general statute, allows for the recovery of attorneys' fees at the conclusion of litigation brought in the public interest if specified criteria are satisfied. See Woodland Hills Residents Assn., Inc. v. City Council, 23 Cal.3d 917, 935 (1979). Section 1021.5, in pertinent part, provides:

> Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement ... are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.

Whether a plaintiff is entitled to fees under Section 1021.5 is not an "all or nothing proposition." Richard M. Pearle, California Attorney Fee Awards (2d ed. 2005) § 4.12. "When the purposes of the litigation are partly public and partly personal, a partial subsidy of

the litigation (for the portion of the action that addresses public issues) may be appropriate." Id. citing Saleeby v. State Bar, 39 Cal.3d 547, 574 (1985) (petitioner's fee award would be apportioned where he "sought to vindicate personal rights and his claim to a particular sum in addition to challenging the general regulatory scheme utilized by the bar"); Hammond v. Agran, 99 Cal.App.4th 115, 128-133 (2002) (political candidate may not recover fees for actions related to his candidacy but may recover fees for post-election litigation about interpretation of Elections Code section because no personal stake at that point); Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors, 79 Cal.App.4th 505, 521 (2000) (remanding CEQA action "for the trial court to consider whether the cost of the Future I appeal is out of proportion to the plaintiffs' non-financial interests in the appeal" and to award fees if so).

The Legislature added Section 425.17(b) to protect a category of "specified public interest actions" from the anti-SLAPP statute. Blanchard, 123 Cal.App.4th at 913. In doing so, the Legislature stated that it was borrowing from Section 1021.5 when drafting Section 425.17(b) and proclaimed the two statutes to be similar. MJN Exh. A (Assembly Committee on Judiciary Analysis, S.B. 515 (June 30,

2003)) at MJN0055 (Section 425.17 factors "correspond[] to the state's private attorney general statute"). In reality, Section 1021.5 and Section 425.17(b) are quite different, and materially so, in how and when they are used by litigants and the courts.

In Blanchard, the court of appeal correctly held that the lawsuit was not protected by Section 425.17(b) because the plaintiffs sought "restitution to them of moneys they paid to DIRECTV," and their "prayer" for relief "expose[d] this cause of action as motivated by personal gain." 123 Cal.App.4th at 916-917. Without explanation, the Court however skipped over the first prong of Section 425.17(b), and held that the plaintiffs could not satisfy the second and third prongs. Id. The Court should have begun its analysis with the first prong.

The Blanchard court made a more fundamental error by stating that the three conditions of Section 425.17(b) "mirror the three elements for determining the eligibility for a fee award under the private attorney general doctrine as codified in section 1021.5." Id. at 914. In fact, Section 1021.5 does not have language at all like what appears in the first part of the test in Section 425.17(b)(1), excluding any actions that seek personal relief from the definition of a public

interest lawsuit. Id.

Though correctly decided, the brief discussion in Blanchard illustrates a fundamental misunderstanding about the private attorney general statute and Section 425.17(b), adopted by the Court of Appeal below. While the statutes parallel each other – the second and third prongs in both statutes are essentially the same – only Section 425.17(b) states that the action must be "brought solely in the public interest" and that the plaintiff cannot seek any relief greater than or different from the relief sought for the general public or the class. As illustrated in Saleeby, Hammond, Families Unafraid to Uphold Rural El Dorado County and other decisions, the private attorney general statute allows plaintiffs to recover their attorneys' fees even if they are seeking "relief for themselves," so long as they can show that their personal interests are transcended by a significant public benefit. Saleeby, 39 Cal.3d at 574; Hammond, 99 Cal.App.4th at 132-133; Families Unafraid, 79 Cal.App.4th at 520, 521.

In contrast, when Section 425.17(b) was enacted, the Legislature specifically noted that "not all public interest or class actions [are intended to be] automatically exempt from the anti-SLAPP law." MJN Exh. A (Senate Judiciary Committee Analysis,

S.B. 515 (May 7, 2003)) at MJN0094, as quoted in Blanchard, 123 Cal.App.4th at 913-14. Thus, a plaintiff is expressly barred from relying on Section 425.17(b) if it seeks "any relief greater than or different from the relief sought for the general public[.]" Cal. Civ. Proc. Code § 425.17(b)(1). Again, similar language appears nowhere in Section 1021.5.

In its decision, the Court of Appeal below also failed to appreciate that Sections 1021.5 and 425.17(b) materially differ in how they are used by courts and litigants. A motion for attorneys' fees under Section 1021.5 is brought at the end of litigation – often litigation that has transpired for years – and is heard by a trial court that is uniquely positioned to determine whether, over time, a plaintiff's personal interest has "transcended" into a significant public benefit. And attorneys' fees are only awarded if the plaintiff has prevailed in the litigation. In contrast, Section 425.17(b) is used at the start of litigation. The statute requires the trial court to analyze – by examining the relief sought in the complaint – whether the plaintiff is seeking any personal relief. Under Section 425.17(b) – unlike Section 1021.5 – the trial court is not asked to determine whether the plaintiff has prevailed (or will prevail) in the case, whether or how much in

attorneys' fees should be awarded, or anything of the sort. The court's focus is exclusively on whether the plaintiff's complaint seeks any personal relief; if it does, the complaint is subject to the rigors of the anti-SLAPP statute.

Largely relying on Braude v. Automobile Club of Southern Cal., 178 Cal.App.3d 994 (1986), Ferry v. San Diego Museum of Art, 180 Cal.App.3d 35 (1986), and Hammond, 99 Cal.App.4th 115, the Court of Appeal supported its analysis of Section 425.17(b) by observing that under Section 1021.5, a plaintiff may only recover attorneys' fees if its personal stake "transcends" into a "public issue." (Op. at 9-16.) The Court of Appeal's analysis of these Section 1021.5 cases correctly describes the holdings of these decisions, but incorrectly draws from these decisions to interpret Section 425.17(b), whose express language and purpose is entirely distinct. Moreover, all of the decisions relied on by the Court of Appeal were decided before Section 425.17 was enacted, and necessarily did not analyze the differences between the two statutes.[7]

Braude, 178 Cal.App.3d 994, provides no guidance here because the plaintiffs did not personally seek to be installed on the

[7] Indeed, Braude and Ferry were decided years before the anti-SLAPP statute was even enacted in California.

Auto Club board, nor did they seek relief that would benefit them individually, unlike the Plaintiffs here. Braude simply discussed the public benefit of litigation brought by members of a mutual benefit automobile association over its election rules.

Similarly, in Ferry, 180 Cal.App.3d at 45, the court of appeal merely endorsed Braude's conclusion that litigation over fair election procedures used by nonprofit corporations benefits the public. Like Braude, the plaintiffs in Ferry did not seek to benefit personally by the lawsuits they filed, such as by asking the court to order them to be allowed to author future Sierra Club election materials and to be personally installed in elective offices despite losing the election in a landslide, as Plaintiffs van de Hoek and CMHE did in this case.

In stark contrast to the plaintiffs in Braude and Ferry, who sought to fix the election procedures for the benefit of the defendant organizations, Plaintiffs brought this litigation to "fix" the 2004 Sierra Club election and future Club elections for their own personal gain. Moreover, unlike the plaintiffs in Braude and Ferry, Plaintiffs did not challenge the reasonableness of Sierra Club's internal rules. As the trial court specifically found: "While Plaintiffs argue in their briefs that the Standing Rules adopted by Sierra Club may also be

unreasonable, no such allegations appear in Plaintiffs' Second Amended Complaint. ... Thus the issue before this Court is whether Sierra Club violated the California Corporations Code and not whether the Club's Standing Rules are proper or not." (CT 1656-1657.)

The Court of Appeal's reliance on the decision in Hammond as controlling in this case is also mistaken. (Op. at. 15-16.) Indeed, Hammond is a perfect example of why Section 1021.5 should not be used to interpret Section 425.17(b). In Hammond, the plaintiff was awarded attorneys' fees even though he initially filed his lawsuit to achieve personal benefits, including challenging an allegedly false campaign statement about him in a voter's guide. 99 Cal.App.4th at 128-133. Yet, in its consideration of Hammond, the Court of Appeal below failed to give proper appreciation to the fact that the candidate and plaintiff in that action only recovered that portion of his attorneys' fees incurred on appeal after his personal stake in the interpretation of the election code that he challenged was no longer an issue, because he had already won the election. Id. Indeed, other attorneys' fees sought by the plaintiff/candidate were denied because the appellate court found that he engaged in litigation as part of his "quest for

elective office" and that he had "a palpable personal stake in the [disputed campaign] statement and the election," which established that a portion of his lawsuit was for personal gain, not for the public interest. Id. at 128. Similarly, the court held that the candidate's litigation over an allegedly false statement about him in the voter's guide was a personal battle to shore up his reputation, not vindicate public rights. Id. at 129. Thus, because the only attorneys' fees awarded in Hammond were for activity in the "public interest," Hammond only supports Sierra Club's contention that a plaintiff may not rely on Section 425.17(b) if it seeks any personal relief.

In providing guidance to the courts of the state regarding the interpretation of Section 425.17(b), this Court should recognize the unique requirements and purpose of this statute – as distinct from the private attorney general statute – to ensure that the exemption is not misused by litigants who seek both public and private benefits. This Court should correct the Court of Appeal's undue reliance on Section 1021.5 and make plain that decisions interpreting Section 1021.5 are not dispositive of challenges under Section 425.17(b), or vice versa.

3. The Court of Appeal's "Principal Thrust or Gravamen" Test Creates Uncertainty and Improperly Focuses on the Cause of Action Pled, Rather than the Relief Sought By a Plaintiff.

The Court of Appeal erred in a third respect when it substituted the requirements plainly spelled out in Section 425.17(b) with its own legal test for when the "public interest" exemption is available. The Court rewrote the "public interest" exemption of Section 425.17(b) to instead hold that Section 425.17(b) does not apply if "the principal thrust or gravamen of the plaintiff's cause of action" is brought in the public interest. (Op. at 16.) In so doing, the Court not only disregarded the language chosen by the Legislature in favor of its own language, it also improperly changed the judicial focus from the relief sought by a plaintiff's Complaint to the cause of action alleged.

The "principal thrust or gravamen" of the cause of action test appears nowhere in Section 425.17(b). This Court granted review in Kids Against Pollution v. California Dental Association, Case No. S117156, in part to determine whether this same test should be used to decide the availability of the anti-SLAPP statute when the defendant's underlying activity involves both protected and non-protected activity. While this may be an open question under Section 425.16, the Legislature already made clear by the plain language of Section

425.17(b), that the "public interest" exemption is to be analyzed based on the relief sought by the Plaintiff and whether the relief satisfies the explicit tests set forth in Section 425.17(b). The legislative history is explicit that the Legislature wanted the focus to be on the relief sought – not on the cause of action pled. E.g., MJN Exh. A (Assembly Committee on Judiciary Analysis, S.B. 515 (June 30, 2003)) at MJN0046-MJN0047.

By reading out the word "relief" in Section 425.17(b) and imposing instead its own subjective, broad test, the Court of Appeal's decision impermissibly expanded the "public interest" exception by making it available to any plaintiff whose action seeks personal relief but whose "principal thrust or gravamen" is purportedly in the "public interest" – as broadly as that phrase can be defined. (Op. at 16.) By using the word "relief," the Legislature intended to concentrate the court's focus exclusively on the relief requested by the plaintiff, and not, as here, on how a particular cause of action might be cleverly pled by a plaintiff to appear as though they are advancing the public's interest in "fair and honest" elections while at the same time, suing and targeting core political speech activities in the midst of a national election to further their own candidacy and cause.

Further, by improperly having the court analyze the causes of action pled by the plaintiff rather than the relief sought, the Court of Appeal's adopted legal test will no doubt lead to a highly subjective application of Section 425.17(b) by trial courts who must determine at the inception of an action if the "principal thrust or gravamen" of the plaintiff's particular cause of action is brought in the public interest. Whether a cause of action qualifies or not is ripe for abuse and confusion and First Amendment-protected activity will suffer. Such a result is wholly improper and unnecessary in light of the plain language of the statute that the Court of Appeal ignored.

4. The Court of Appeal Erred by Applying Section 425.17(b) to Each Cause of Action Rather than Plaintiffs' Entire Complaint.

The Court of Appeal's fourth error is implicit in its decision to apply the exemption of Section 425.17(b) on a cause-of-action by cause-of-action basis, rather than determine whether Plaintiffs' entire "action" is barred once personal relief is identified, as the statute expressly contemplates. Cal. Civ. Proc. Code § 425.17(b). Nowhere in Section 425.17(b) or its sub-sections does the phrase "cause of action" appear. Instead, Section 425.17(b) provides that it "does not apply to any action brought solely in the public interest." (Emphasis

added.) In contrast, the phrase "cause of action" appears in subsection (c) of Section 425.17, illustrating that the Legislature intended that exemption to apply to particular causes of action. A "cardinal rule of statutory construction is that courts may not add provisions to statutes." Security Pacific Nat'l Bank v. Wozab, 51 Cal.3d 991, 998 (1990) (citations omitted); accord Cal. Civ. Proc. Code § 1858 (in construing statute, court must not "insert what has been omitted"). Yet, that is precisely what the Court of Appeal did here.

Moreover, although the phrase "cause of action" is also used in Section 425.16, this is clearly to permit the anti-SLAPP statute to be used defensively, against particular causes of action. City of Cotati v. Cashman, 29 Cal.4th 69, 78 (2002) ("[t]he defendant's act underlying the plaintiff's cause of action must itself have been an act in furtherance of the right of petition or free speech"). There is simply no indication that the Legislature sought to allow the exemption found in Section 425.17(b) to be used on a cause-of-action by cause-of-action basis.[8]

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[8] Another illustration of the difference between Section 1021.5 and Section 425.17(b) is that under Section 1021.5, the availability of attorneys' fees are analyzed on a cause-of-action by cause-of-action basis. E.g., Folsom v. Butte County Assn. of Governments, 32 Cal.3d 668, 685 (1982) (plaintiff entitled to fees although defendant's

In this case, the Court of Appeal determined that the third cause of action alleged by Plaintiffs – for alleged breach of fiduciary duty by Sierra Club Directors Aumen and O'Connell – was personal, and not exempt under Section 425.17(b). (Op. at 17-18.) Although the Court of Appeal analyzed this claim using its improper "principal thrust or gravamen of the plaintiff's cause of action" test, it reached the correct result because it recognized the highly personal nature of the relief sought by Plaintiffs. (Id.) However, the Court compounded its interpretative errors when it failed to dismiss Plaintiffs' entire action, once it identified this indisputably personal aspect of Plaintiffs' Complaint.

Plaintiff CMHE agrees that this is the correct interpretation of Section 425.17(b). As it told this Court in its Answer to the Petition for Review:

> By merely using the same words that it used in subsection (c), the Legislature could certainly have said that it wished to exempt individual causes of action under subsection (b) if it chose. Instead, it chose to exempt entire actions, not merely individual causes of action within those actions. The intent of the Legislature would thus be subverted were courts to pick and choose which causes

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summary judgment motion partially successful).

> of action qualify for the protection of section 425.17(b) and which do not.

Id. at 19-20. Thus, the parties to this appeal agree that only by applying Section 425.17(b) to the entirety of a plaintiff's complaint – rather than on a cause-of-action by cause-of-action basis – can the Court ensure that courts do not abuse the limited discretion given to them under Section 425.17(b). The perverse outcome in this case is ample evidence of why such limited discretion is required.

For each of these four independent reasons, the Court of Appeal's misinterpretation of Section 425.17(b) should be rejected by this Court.

E. The Court of Appeal's Decision Threatens the First Amendment Rights of Defendants, Who Would Otherwise Enjoy the Protections of the Anti-SLAPP Statute.

First Amendment-protected political speech will be at risk if this Court does not reverse the Court of Appeal's decision. The Court's misreading of Section 425.17(b) substantially broadens the availability of the "public interest" exemption and condones an alternative test that is subjective and uses an ambiguous criteria that concentrates on a plaintiff's cause of action rather than the relief sought by the complaint. If courts begin to use this improper criteria, the "public interest" exemption will no longer ensure the swift

dismissal of lawsuits improperly targeting political speech that are motivated by personal interest.

Once litigants learn that the anti-SLAPP statute is unavailable to the defendants in these kinds of actions, the benefits of the anti-SLAPP statute – the stay of discovery, the automatic right of appeal, the mandatory recovery of attorneys' fees, among others – will cease to serve as any deterrent to "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition." Cal. Civ. Proc. Code § 425.16(a); id. § 425.17(e); Goldstein v. Ralphs Grocery Co., 122 Cal.App.4th 229, 233 (2004) ("once the challenged cause of action is subject to one of the exemptions in section 425.17, subdivision (b) or (c), the immediate appeal right no longer exists").

The irony of such an outcome in this particular litigation cannot be understated. With the benefit of a complete record in which Sierra Club successfully prevailed on summary judgment – and as well, prevailed on portions of two special motions to strike – the Court of Appeal was well aware that these Plaintiffs could never recover fees under Section 1021.5 because they lost their election challenge on the

merits.[9] Although Plaintiffs purportedly brought this litigation in the public interest, only CMHE pursued this appeal, admittedly, to avoid having to pay mandatory attorneys' fees to Sierra Club under the anti-SLAPP statute. The trial court had the opportunity to consider Plaintiffs' earlier complaints (in which Plaintiffs also requested relief that was consistently personal and even vindictive (CT 28-32, 108-113)), and properly appreciated that Plaintiffs' litigation was personally motivated. (CT 705.)

But without the protections provided by the anti-SLAPP statute, in the future, Sierra Club's right – and the rights of other organizations to authorize the expenditure of funds to communicate with their memberships as explicitly guaranteed by Corporations Code Section 5526 – is in jeopardy. Moreover, an individual's right to speak about "political matters" – "the quintessential subject" of constitutional free speech rights – is threatened. Matson v. Dvorak, 40 Cal.App.4th 539, 548 (1995).

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[9] Emboldened by the Court of Appeal's conclusion that Section 425.17(b) exempted three out of four of the causes of action in their Complaint, despite losing their case on the merits and not appealing this loss, Plaintiff CMHE intends to seek attorneys' fees under Section 1021.5. See Sierra Club's Motion for Judicial Notice in Suppt. of Pet. for Review, Attachment B. This result illustrates the problems created by the Court of Appeal's decision, if not the true agenda of these supposed "public interest" plaintiffs.

As the court observed in Davis Committee, lawsuits targeting campaign finance procedures generally "effect[] the fundamental right of political communication afforded under the federal and state Constitutions," even if they do not expressly dictate the content of political speech. 102 Cal.App.4th at 460. Here, Plaintiffs' Complaint targeted Sierra Club's political speech and the legitimate decision of its Board of Directors to finance this speech. Action by this Court is needed to preserve the availability of the anti-SLAPP statute to safeguard future political speech associated with elections throughout California.

5.

THE ANTI-SLAPP STATUTE APPLIES TO PLAINTIFFS' COMPLAINT FOR THE INDEPENDENT REASON THAT SIERRA CLUB'S STATEMENTS CONSTITUTE "POLITICAL WORKS" PROTECTED BY SECTION 425.17(d)(2).

When it created the narrow exemption found in Section 425.17(b), to ensure that speech at the heart of the First Amendment would continue to receive the protection of the anti-SLAPP statute, the Legislature also created an exemption within Section 425.17 – subdivision (d). Although Sierra Club briefed this issue to the Court of Appeal below, its decision failed to address this independent

grounds for upholding Sierra Club's reliance on the anti-SLAPP statute.

As shown below, the Mayhue Article and the Urgent Election Notice targeted by Plaintiffs' Complaint fall squarely within the protection of Section 425.17(d)(2). Therefore, even if the Court concludes that the language of Section 425.17(b) applies to Plaintiffs' Complaint, Sierra Club nevertheless should prevail on this appeal because its writings targeted by Plaintiffs are independently protected as "political work[s]" by Section 425.17(d)(2).

A. The Speech at Issue Here is "Political" Speech Because it Was Designed to Protect Sierra Club's Policies in National Politics.

California Code of Civil Procedure Section 425.17(d) provides, in relevant part, as follows:

> Subdivisions (b) and (c) do not apply to any of the following:
>
> ...
>
> (2) Any action against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work, including, but not limited to, a motion picture or television program, or an article published in a newspaper or magazine of general circulation.

Id. (emphasis added). Given the express purpose of the anti-SLAPP statute to protect the exercise of free speech rights, the Courts of Appeal have broadly defined the "political works" protected by Section 425.17(d)(2) to include all statements of a political nature.

In Major v. Silna, 134 Cal.App.4th 1485, 1492-1497 (2005), for example, the Court of Appeal relied on Section 425.17(d)(2) to protect letters mailed by the defendant in support of political candidates in a municipal election. In Major, as in this action, the plaintiff sought an injunction to prevent the defendant from engaging in such mailings and paying for political advertisements. 134 Cal.App.4th at 1494. The Court of Appeal concluded:

> [P]olitical literature on candidate qualifications exemplifies "[t]he right to speak on political matters," which is "the quintessential subject" of constitutional free speech rights. ... We therefore conclude that the Legislature did not intend to exclude such literature from the political works denoted in [Section 425.17] subdivision (d)(2), given the Legislature's goal of reaffirming the anti-SLAPP law as a protector of free speech rights through the enactment of section 425.17.

Id. at 1495-1496 (emphasis added). Rejecting plaintiff's argument that the legislative history supported a narrow construction of Section 425.17(d)(2) to protect only motion pictures, newspapers and similar

works, the Court of Appeal explained that while that may have been the Legislature's original intent, the protection afforded by Subsection (d)(2) was expanded to encompass a broader array of works. Id. at 1497. Thus, "the Legislature checked the reach of the 'public interest' exception by enacting subdivision (d)(2), which preserves the application of the anti-SLAPP law to actions against individuals that implicate important forms of protected speech." Id. (emphasis added).

In Ingels, 129 Cal.App.4th 1050, the court of appeal reached a similar result. There, the court held that even if Section 425.17(b) otherwise might apply to plaintiff's claims based on a radio broadcast discussing an issue of public concern, it was exempted by Section 425.17(d)(2), and consequently Section 425.17 had no application to the lawsuit (and the anti-SLAPP statute applied). In doing so, the court did not limit the protection of Section 425.17(d)(2) to the specific categories enumerated in that Subsection, but instead applied it broadly – as the Legislature intended – to encompass all similarly situated works. Id. at 1067-1068.

As in Major and Ingels, Section 425.17(d) squarely protects all of Plaintiffs' claims against Sierra Club. There can be no dispute that all four of Plaintiffs' causes of action were "based upon" Sierra

Club's "dissemination" of "political work[s]," including the disputed Urgent Election Notice and the Mayhue Article, both of which were circulated throughout the Club's membership. (CT 721-729.) Without a doubt, these writings and the other election-related materials challenged by Plaintiffs were "political work[s]" under Section 425.17(d)(2) because they communicated information about the qualifications of the Sierra Club Board candidates, the issues involved in the Club's controversial 2004 election, and the future agenda of Sierra Club as the nation's largest grassroots environmental group. (Section 3.A., infra.) These materials also directly addressed national politics, and the importance of the Sierra Club election to further its goals of influencing the then-upcoming Presidential election. For example, in more than half of the 17 candidate statements distributed by the Club, the candidates expressed their opposition to President George W. Bush, and their desire that the Club join together to defeat him in the election. (CT 050-058.) These candidates and others expressed as the Sierra Club's paramount goal the influence of national politics to further environmental protection. (Id.)

The Mayhue Article similarly expressed the author's concern that the Club remain neutral on the hot-button topics of immigration and animal rights, to ensure that it could continue to fight for its "conservation agenda." (CT 082.) The article encouraged members to vote and thereby control the direction of Sierra Club:

> The internal Sierra Club election this spring could prove pivotal and could dramatically alter the direction and mission of our organization. In fact, the Sierra Club we all joined may have a very different look to it next year, depending on the outcome of the 2004 Board of Directors election. Thats [sic] because current members of the Sierra Club Board of Directors have openly recruited candidates with agendas widely different from the Clubs [sic] historic conservation mission.

(CT 080.) The Article also expressed a concern with national politics, declaring that in the 2004 Sierra Club election, "our ability to stop the Bush administrations [sic] assault on our environment and overcome some of the most serious environmental challenges we have ever faced" was at stake. (CT 083; accord CT 084.) In addition, the Mayhue Article urged Club members to vote for particular candidates and reject others. (CT 081-083.)

The Urgent Election Notice asked members to "cast your vote in this year's election as a means of demonstrating to outside groups

that they cannot influence our organization. Vote for candidates whose positions reflect your values and vision for the future of the Sierra Club." (CT 941.) Through the Notice, the Club's leadership also expressed its recognition that the Club "has become an even more influential and effective voice in American society over the last decade" and its hope that the Club would remain "faithful to its environmental mission and principles." (Id.) Each of these statements exemplifies the fundamentally political nature of the speech challenged by Plaintiffs' Complaint.

B. Sierra Club's Speech Also Is "Political," and Protected by Section 425.17(d)(2), Because the Anti-SLAPP Statute Consistently Has Been Interpreted to Protect Speech Related to the Politics of Private Organizations.

Plaintiff CMHE has argued in the past that the works at issue here are "ideological," not "political," and consequently that they are not protected under Section 425.17(d)(2). But Sierra Club's speech that Plaintiffs' Complaint targeted cannot fairly be described as ideological – it was not a philosophical discussion, or a review of the latest film or book (although these also would be protected by the express language of Section 425.17(d)(2)). Rather, it revolved around the annual election of the Board of Directors of the nation's largest grassroots environmental organization, the purpose of which is to

influence national, state and local governments in areas important to its members. Sierra Club's speech at issue in this action is indisputably political speech because it was designed to influence the election of its Board of Directors.

Plaintiff CMHE's argument ignores the broad scope of protection afforded by the anti-SLAPP statute, as it repeatedly has been recognized by California's Courts of Appeal. Thus, in one of the earliest decisions addressing the anti-SLAPP statute, the court held that "[a]lthough matters of public interest include legislative and governmental activities, they may also include activities that involve private persons and entities, especially when a large, powerful organization may impact the lives of many individuals." Church of Scientology v. Wollersheim, 42 Cal.App.4th 628, 650 (1996), disapproved on other grounds, Equilon, 29 Cal.4th at 68 n.5 (citation omitted) (holding that activities of Church of Scientology are a matter of public interest).

The following year, in Macias, the court recognized that the speech protected by the anti-SLAPP statute extends to discussions about the government of private organizations. 55 Cal.App.4th 669. There, the speech at issue related to a union election, but this did not

stop the court from treating the speech as "political speech," at the core of the First Amendment's protection. Id. at 673-674. In describing the significance of the speech at issue, the court explained:

> Where, as here, a candidate speaks out on issues relevant to the office or the qualifications of an opponent, the speech activity is protected by the First Amendment. ... "The right to speak on political matters is the quintessential subject of our constitutional protections of the right of free speech. Public discussion about the qualifications of those who hold or wish to hold positions of public trust presents the strongest possible case for applications of the safeguards afforded by the First Amendment. ... Accordingly, the campaign mailer at issue was plainly published in furtherance of the author's "'right ... of free speech under the United States or California Constitution in connection with a public issue,"' and thus brings an action arising from its publication within the purview of section 425.16." ...

Id. at 673 (citations omitted; emphasis added); accord Rivero v. American Federation of State, County & Municipal Employees, AFL-CIO, 105 Cal.App.4th 913, 929 (2003) (distinguishing Macias because "[t]he campaign activity at issue in that case represented the quintessential subject of First Amendment protection").

Macias has been uniformly accepted by the courts of appeal. Another appellate court followed the Macias holding in a case

addressing discussions about the management of a private homeowner's association club. Damon v. Ocean Hills Journalism Club, 85 Cal.App.4th 468 (2000). The court described Macias as concerning "a fundamental political matter – the qualifications of a candidate to run for office." Id. at 479. The court then held that, as in Macias, the statements at issue there were protected by the anti-SLAPP statute, explaining: "Indeed, they concerned the very manner in which this group of more than 3,000 individuals would be governed – an inherently political question of vital importance to each individual and to the community as a whole." Id. The court rejected the argument that the anti-SLAPP statute's protection does not apply to statements about private organizations, explaining that private organizations often serve as surrogates for local government. Id. at 479-480.

Finally, in Ruiz v. Harbor View Community Ass'n, 134 Cal.App.4th 1456 (2006), Macias was again followed in a case in which the court held that statements relating to a homeowners' association's rejection of plaintiffs' request to permit the re-design of plaintiffs' house were within the scope of the anti-SLAPP statute. Id. at 1461. The court explained that "[t]he controversy over the plans

continued for months, and evolved into a controversy over HVCA governance ... ." Id. at 1469. That court adopted Macias's holding that these issues are "inherently political" notwithstanding that they involve the politics of private organizations, rather than the government. Id. at 1469-1470.

The Legislature adopted Section 425.17 with Macias in mind. As this Court repeatedly has recognized, it must assume that the Legislature is aware of existing caselaw when it enacts legislation. E.g., People v. Overstreet, 42 Cal.3d 891, 897 (1986) (citations omitted). The Legislature is presumed to be aware that the anti-SLAPP statute has been broadly construed, that it repeatedly has been held to protect speech related to private organizations, and that its protections have been applied to speech regarding the politics within those private organizations. If the Legislature wanted to limit the protection of Section 425.17(d)(2) to "political works" addressing federal, state or local governments, it could have done so. It decidedly did not. Consistent with its earlier mandate that the anti-SLAPP statute be broadly construed, in 2003, Section 425.17(d)(2) was enacted to protect a variety of works, which it defined inclusively as "any dramatic, literary, musical, political, or artistic work,

including, but not limited to, a motion picture or television program, or an article published in a newspaper or magazine of general circulation." Id. (emphasis added).

The political speech challenged by Plaintiffs readily falls within this category of protected items, particularly when viewed against the backdrop of the protection California's courts routinely have provided for speech of this nature. It is squarely protected by Section 425.17(d)(2) – both because its goal was to affect national politics, by electing a Board of Directors that would advance a particular agenda, and because it involved the internal politics of Sierra Club, the nation's premier grassroots environmental organization. Thus, Section 425.17 does not apply to Plaintiffs' claims, and Sierra Club is independently entitled to the protection of the anti-SLAPP statute. Because Sierra Club met its burden of establishing that Plaintiffs' claims derive from the Sierra Club's First Amendment-protected speech in connection with an issue of public concern, and because Plaintiffs failed to establish a probability of prevailing on the merits, Sierra Club's anti-SLAPP motion should have been granted in its entirety.

6.
CONCLUSION

The Court of Appeal's decision is entirely inconsistent with the plain language of Section 425.17(b). The decision expands the "public interest" exemption to the anti-SLAPP statute in a manner that is not only unwarranted, but will certainly lead to abuse by litigants who, like Plaintiffs here, seek personal relief in connection with their "public interest" lawsuit. This Court should correct the Court of Appeal's misinterpretation of Section 425.17(b), grant Sierra Club's special motion to strike in its entirety, and thereby ensure the anti-SLAPP statute's continued viability to safeguard First Amendment protected speech.

Dated: September 15, 2006

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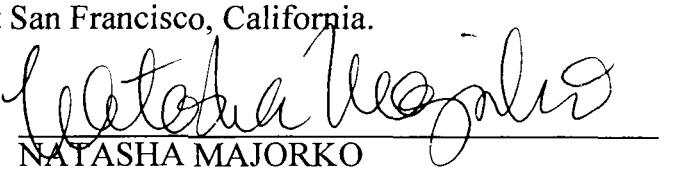

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